BETTER MARKETS

March 2, 2020

By Electronic Submission

Commodity Futures Trading Commission
Christopher Kirkpatrick, Secretary
1155 21st Street, N.W.
Washington, DC 20581

Re: Prohibition of Post-Trade Name Give-Up on Swap Execution Facilities (RIN 3038-AE79).

Ladies and gentlemen,

Better Markets, Inc.[1] ("Better Markets") appreciates the opportunity to provide comments on the Commodity Futures Trading Commission's ("CFTC") proposal to prohibit the practice of disclosing counterparty names upon anonymous execution of cleared swaps on swap execution facilities ("Post-Trade Name Give-Up").[2] Better Markets and commenters involved in all aspects of the financial markets have almost uniformly agreed that the practice of Post-Trade Name Give-Up is an unnecessary, unlawful, and anti-competitive legacy risk management practice from the pre-2008 bilateral, uncleared over-the-counter ("OTC") derivatives markets. Accordingly, the CFTC must prohibit the practice of Post-Trade Name Give-Up for cleared swaps anonymously executed on swap execution facilities ("SEFs"), which would increase and diversify liquidity, ensure market participants have impartial access to swaps markets, and protect market integrity by preventing the largest U.S. derivatives dealers from unfairly gleaning trading information and reverse engineering trading strategies.

Derivatives market realities provide important context to the proposal. More than 87% percent of the reported $201 trillion notional in derivatives within the U.S. banking system is controlled by dealers within just four U.S. bank holding companies ("BHCs").[3] Each of these four BHCs also facilitates trading in a significant percentage of the $640 trillion notional in global derivatives markets through multiple affiliated non-U.S. dealers.[4] The largest four derivatives dealer corporate groups in terms of notional amount outstanding do not just control the uncleared OTC swaps markets; they essentially ***are*** that swaps market in many respects.

The cleared U.S. swaps markets, while less concentrated, also evidence considerable dealer market power and concentration. The eight largest U.S. futures commission merchants ("FCMs") hold $113.87 billion of cleared swaps customer collateral, which constitutes 96% of the total across only 18 FCMs providing material clearing services in the U.S. cleared swaps markets.[5] More broadly, "five firms, all bank-affiliated, account for over 80% of total client margin for cleared interest rate swaps in the United States, United Kingdom and Japan," three jurisdictions overseeing a very significant majority of the global swaps markets.[6]

This substantial market power is used to influence or control the commercial practices of SEFs. Thus, although SEFs could amend their rulebooks to end the practice of Post-Trade Name Give-Up without regulatory intervention, they are practically unable to do so due to the commercial stranglehold an exceedingly small number of dealers and their affiliates have on SEFs competing for their liquidity. According to numerous market participants[7] and facts alleged in connection with a historic $1.864 billion private antitrust settlement relating to derivatives dealers' retaliatory measures,[8] SEFs that challenge the supposedly "market-based" practice of Post-Trade Name Give-Up (and instead seek to provide impartial access to their platforms and modes of execution) quickly lose dealer liquidity to SEF competitors willing to enable anticompetitive practices.[9] Consequently, the SEF marketplace has been inefficiently, unfairly, and almost entirely forced into a fragmented market structure, with a small number of dealer-to-dealer SEFs facilitating privileged access to interdealer trades on order books and an even smaller number of dealer-to-client SEFs offering electronic trading against a markup to those markets,[10] primarily through request-for-quote ("RFQ") systems.

Post-Trade Name Give-Up should not be viewed as an anti-competitive practice in isolation. Rather, it is the practice of Post-Trade Name Give-Up in conjunction with related factors—for example (1) the market power of the largest U.S. derivatives dealers and their ability to influence the commercial viability of other market-led reforms,[11] (2) the availability of exceptions and exemptions from clearing and trading mandates, including those relating to "package transactions";[12] and (3) the CFTC-encouraged proliferation of unregistered single-dealer platforms[13]—that collectively have been detrimental to development of transparent, electronic, and multilateral trading since enactment of the Dodd-Frank Wall Street Reform and Consumer Protection Act.[14] These and other factors have all but ensured the continuation of the dealer-centered, dealer-dominated, and dealer-advantaged derivatives markets that have relegated other market participants to a permanent price taker status, undermining the Commodity Exchange Act's ("CEA") objectives of increasing trading on SEFs and promoting pre-trade transparency in the swaps markets.[15]

Ending Post-Trade Name Give-Up would not be a panacea that ends dealer control of the derivatives markets. **Nevertheless, the CFTC must take the <u>initial</u> step of finally ending that legacy OTC market practice, which is designed to protect the market power and profits of dominant derivatives dealers and serves no legitimate purpose in cleared swaps markets.**

In particular, we emphasize the following critical points:

(1) **Post-Trade Name Give-Up does not support any legitimate risk management objective in connection with cleared, anonymously executed swaps.** Indeed, the sole commenter favoring the practice—a trade association representing the derivatives dealers—in no way contradicts this fact and even notes that its own dealer members could not agree that the practice was beneficial.[16]

(2) **Post-Trade Name Give-Up promotes continued access to privileged liquidity by a very small number of dominant swap dealers**, contrary to the CEA's statutory purposes and core principles of the SEF regulatory framework and policies reflected in other regulations prohibiting disclosure of counterparty information.

(3) **Post-Trade Name Give-Up deters SEF participation on account of trading advantages provided to dealers that glean trading information.** The largest derivatives dealers use that information in a manner that buy-side market participants and competing liquidity providers have repeatedly explained is adverse to their trading interests, transparency, and liquidity formation.

The CFTC has proposed to end this unnecessary and obviously anti-competitive practice, and it must. In the process, it will have facilitated a transition to a better diversified, more liquid, more transparent, and less systemically fragile market structure.

In light of the advantages that the practice of Post-Trade Name Give-Up provides to the largest derivatives dealers, it is not surprising that the International Swaps and Derivatives Association, Inc. ("ISDA")—a dealer-governed trade association—has failed to take any public action to end the practice, which may be a violation of its undertakings in a recent private antitrust settlement. In that settlement, ISDA agreed to do the following:

> At the earliest reasonably practicable time, the ISDA Board will formally consider and vote on a proposal for ISDA to make an official statement in favor of abolishing the practice of post-trade name disclosure ("Name Give-Up") in the market for CDS. ISDA staff will support implementation of any CFTC guidance related to the elimination of or limitations on Name Give-Up or similar procedures that interfere with the anonymity of participants in multilateral trading venues.[17]

ISDA has made no apparent effort to publicize a vote on "a proposal for ISDA to make an official statement in favor of abolishing the practice of post-trade name disclosure." The lack of public information in that regard suggests one of three <u>possible</u> reasons:

- The ISDA Board has failed even to consider an official statement in favor of abolishing the practice of Post-Trade Name Give-Up, in clear violation of the undertaking;
- The ISDA Board has considered and voted on such a statement but determined not to approve it (and does not want to bring public attention to that fact); or
- The ISDA Board considered and approved such a statement but determined to keep that fact secret from the CFTC and others in order to preserve the practice of Post-Trade Name Give-Up for as long as possible.

In addition, with respect to the second element of the undertaking, ISDA has neither filed any comment letter nor made any public statement—through its staff or otherwise—that "supports implementation" of the CFTC's proposal to "eliminate" or "limit" Post-Trade Name Give-Up and "similar procedures."[18] That is true, even though the CFTC has issued a request-for-comment on guidance not just "related to" Post-Trade Name Give-Up but squarely addressing it.[19] In addition, in the current proposal, the CFTC has proposed a specific regulatory prohibition on Post-Trade Name Give-Up, with guidance on the multiple reasons for eliminating the practice.[20] The second element of the undertaking presumably requires ISDA's staff to issue a public statement—preferably as part of the administrative record—supporting the CFTC's rulemaking.

I. Post-Trade Name Give-Up is nearly universally viewed as detrimental to the cleared swaps markets and contrary to the purposes of the SEF regulatory framework under the Dodd-Frank Act.

Under the proposal, the CFTC would amend part 37 of its regulations to prohibit the practice of Post-Trade Name Give-Up for swaps that are anonymously executed on a SEF and are intended to be cleared. In particular, Proposed § 37.9(d)(1) would prohibit a SEF from directly or indirectly, including through a third-party service provider, disclosing the identity of a counterparty to a swap that is executed anonymously and intended to be cleared.[21] The proposed regulation would also require SEFs to establish and enforce rules that prohibit any person from effectuating such a disclosure.[22] These proposed changes would mark a long overdue change to anti-competitive, anti-market practices forced upon the SEFs by the derivatives dealers.

There is no legitimate disagreement among market participants on the adverse consequences of Post-Trade Name Give-Up. To date, all public commentary has stated that Post-Trade Name Give-Up is unnecessary, detrimental to liquidity formation, and contrary to the purposes of the SEF framework—with the exceptions of Goldman Sachs' tepid reservations in a 2015 advisory committee meeting[23] (and even then, we note that Goldman Sachs Asset Management does not agree with Goldman's other lines-of-business[24]) and comment letters submitted by SIFMA, another dealer trade association,[25] which express certain views remarkably similar to Goldman's.[26] **The CFTC itself has acknowledged that "[n]early all of the comment letters to the Name Give-Up Release asserted that trade name give-up is not justified for swaps submitted to a DCO for clearing."[27]**

Consider the broad cross-section of market participants that have publicly objected to the continued practice of Post-Trade Name Give-Up, excluding the large number of litigants implicitly objecting to the practice:

Chart 1.

Swaps Market Participants Opposing the Practice of Post-Trade Name Give-Up	
Vanguard[28]	Eaton Vance[29]
D.E. Shaw[30]	Bloomberg SEF[31]
Securities and Financial Markets Association, Asset Management Group[32]	Managed Funds Association[33]
Investment Company Institute[34]	UBS Securities LLC[35]
MetLife[36]	PIMCO[37]
Russell Investments[38]	Eleven Federal Home Loan Banks[39]
Citadel Securities[40]	Wellington Management[41]
Goldman Sachs Asset Management[42]	Futures Industry Association Principal Traders Group[43]
AQR Capital Management[44]	Two Sigma Investments[45]

Responsible policy cannot be made by tallying the number of market participants on different sides of an issue. **However, it is noteworthy, highly unusual, and perhaps unprecedented for such a diverse group of market participants and others to agree on any derivatives market structure issue, much less one that influences the composition of participants in the markets.**[46] In addition, it is well known to most Wall Street lawyers and practitioners that the derivatives dealers supporting Post-Trade Name Give-Up have long been prepared for its prohibition but commercially motivated to delay trade intervention by proprietary trading firms, which will open the door to disintermediation and collapse spreads between markets.

Non-industry commenters have also supported the prohibition.[47] For example, respected academic expert witnesses have commented and determined, respectively, that the practice of Post-Trade Name Give-Up has been, and will continue to be, detrimental to swaps market quality.[48] Furthermore, the CFTC identifies a dozen or so "instructive" academic studies that either theoretically or empirically suggest that the type of trade anonymity in global equities and other markets would result in market quality improvements if applied to the swaps markets.[49] Having reviewed those academic studies, and others, we agree with the CFTC that the academic literature, by and large, advises swift adoption of post-trade anonymity at least in the current order book modes of execution across cleared swaps markets. Neutral commenters have made it clear that would not be an operational challenge. IHS Markit, one of the defendants in the antitrust lawsuit mentioned above, has expressed no opinion on Post-Trade Name Give-Up specifically but has stated that the prohibition could be implemented with readily available technology at minimal cost and effort.[50]

Unsurprisingly, on the opposite end of all this agreement is a single commenter, SIFMA, representing the dealers' commercial interests. Even then, SIFMA acknowledges that the "available evidence shows that the current market structure has, overall, benefitted market participants through tighter pricing and increasingly deep liquidity,"[51] which is remarkable given the organization's past vehement objections to numerous aspects of the SEF market structure, including the minimum trading functionality and order book requirements.[52]

It is likely that SIFMA will again raise two philosophical objections to the CFTC's proposal. First, it is likely to claim that the elimination of Post-Trade Name Give-Up would limit customer choices and available trading models.[53] **In fact, the opposite is true.** As we noted above, the dealers' commercial leverage over SEFs makes it practically impossible for trading platforms to offer customers and liquidity providers any choices at all with respect to interdealer order book trading. Second, SIFMA is likely to again assert that Post-Trade Name Give-Up is an acceptable practice, because "not every product can be, nor should be, traded fully anonymously."[54] Without addressing the merits of that claim (or lack thereof), we note simply that it is irrelevant. If the CFTC prohibits the practice of Post-Trade Name Give-Up, disclosed RFQ trading would remain permissible for Required Transactions[55] and trading through any means of interstate commerce would remain available for Permitted Transactions.[56] **Post-Trade Name Give-Up affects one optional mode of execution for the most liquid subset of swaps subject to clearing and trading mandates, which can continue to be traded through more flexible, competing protocols as well.**[57] SIFMA's two philosophical objections are therefore unpersuasive at best, and untrue and/or irrelevant at worst.

SIFMA also has mirrored Goldman Sachs' concern that a prohibition on Post-Trade Name Give-Up would impede non-competitive trades, or so-called "package transactions."[58] Package-transaction exceptions have long outlived their usefulness and appropriateness as a transitional measure in the early months of the trade execution mandate. They should be eliminated as well. **In any event, the practice of Post-Trade Name Give-Up must not be maintained simply because dealers, like Goldman, benefiting from it assert that they must continue to trade *around* the market instead of *through* it.**[59] Goldman's comments in no way diminish the force of arguments, observations, and market realities expressed by the rest of the marketplace. Those, in essence, suggest that a prohibition on Post-Trade Name Give-Up would introduce competing liquidity providers to order book markets in which Goldman and SIFMA's members are presently active, reducing spreads for end-users, increasing non-dealer participation on SEFs, and materially diversifying markets with attendant systemic risk benefits. Thus, even if Goldman's concerns about package transactions were valid (and other commenters suggest that they are not[60]), the CEA's objectives for the multilateral SEF framework must supersede any such parochial concerns about non-competitive trading.[61] Moreover, should a prohibition on Post-Trade Name Give-Up force legs of package transactions back onto SEFs—distributing elements of the transaction between multiple counterparties—that consequence would be consistent with statutory objectives to increase pre-trade transparency and trading on SEFs anyway.

Finally, although **none** of the prominent derivatives dealers submitted a public comment with respect to the CFTC's request-for-comment on Post-Trade Name Give-Up, nearly **all** of them sent New York executives to Washington, D.C. to visit the CFTC and advocate for their views in private. According to CFTC disclosures on ex parte communications in connection with the Post-Trade Name Give-Up request-for-comment,[62] Citigroup,[63] Bank of America,[64] Barclays,[65] Goldman Sachs,[66] J.P. Morgan,[67] Morgan Stanley,[68] HSBC,[69] interdealer SEFs,[70] and other market participants met with CFTC officials on the practice in close proximity to each other, strongly suggesting coordination of their lobbying efforts. None of these individual dealers filed a comment letter or otherwise made their views on the practice public and amenable to rebuttal, with the notable exception of Goldman. **It seems telling that the firms most reluctant to express views on Post-Trade Name Give-Up publicly are the firms most eager to do so privately.**

Of course, the dealers' desire to privately advocate for the practice of Post-Trade Name Give-Up is understandable. The avalanche of meritorious rebuttal to the dealers' arguments—which undoubtedly will be apparent in the administrative record—can only jeopardize their stranglehold on order book liquidity, whereas private ex parte dealer lobbying prevents a full public airing and considered public analysis of their contentions.

II. Post-Trade Name Give-Up serves no legitimate credit, operational, or legal risk management purpose for cleared swaps that are anonymously executed on SEFs.

In the uncleared swaps markets, Post-Trade Name Give-Up was widely practiced and necessary, because counterparties otherwise would not have the ability to allocate and manage bilateral credit, operational, and legal risks. **In a cleared, anonymously SEF-executed swap, however, there is no legitimate purpose for Post-Trade Name Give-Up, as each alpha swap is executed with pre-trade credit approvals and almost immediately novated to a clearinghouse, leaving counterparties without ongoing credit, operational, and legal exposures to each other.** Once submitted for clearing, any operational, clerical, or other error that results in that swaps transaction being rejected would render the trade void ab initio. Thus, the cleared swaps market structure is reminiscent of the anonymously executed markets in futures, options, and equities, where Post-Trade Name Give-Up is non-existent and for good reason: counterparties do not need to know the identity of their counterparties.

In cleared swaps markets with straight-through processing ("STP") from the point of execution through clearing acceptance ("E2C"), each counterparty involved in the novation process usually accepts credit, payment and settlement, operational, and other risk exposures to a clearinghouse within seconds, or it has no exposures at all.

A. Post-Trade Name Give-Up is fundamentally at odds with the CFTC's imposition of STP throughout the swaps market infrastructure and E2C workflow, a critical foundation for multilateral trading.

Multilateral trading must be built, first and foremost, on the foundations of clearing incentives and appropriately broad clearing mandates, which facilitate the migration of risks from individual counterparties to central clearinghouses. Clearing mitigates systemic risk arising from complex, bilateral credit exposures by novating a given counterparty's derivatives positions to a single credit exposure to a CFTC-regulated clearinghouse ("DCO").[71] The DCO, in turn, limits leverage through margin requirements,[72] safeguards and limits the form of collateral posted to support positions,[73] and mutualizes default and non-default risks[74] (among other disciplining financial resource and risk management requirements on clearing members).[75] **By eliminating the necessity of knowing and maintaining bilateral documentation with trading counterparties, clearing facilitates a multilateral trading environment in which market participants have the ability to transact with the largest available number of counterparties in the marketplace**. This, in turn, creates a virtuous feedback loop—initially reducing impediments to trading and resulting in more liquid and stable markets, and subsequently attracting even more trading interest that reduces hedging and other costs further.

To achieve these outcomes, the clearing infrastructure requires near real-time processing of swaps from E2C (e.g., prompt coordination,[76] routing,[77] processing,[78] and trade acceptance by clearinghouses,[79] FCMs,[80] SEFs,[81] and affirmation services[82]). STP throughout the E2C workflow is a critical foundation for liquid, multilateral markets, because even an exceedingly minimal lack of trade or clearing certainty is sure to be used by dealers to justify "breakage" agreements[83] and similar mechanisms that limit competition in the markets—i.e., limit the liquidity providers with which counterparties can interact. **Such mechanisms are unnecessary, however, if the risks addressed by them are eliminated**; that is why swaps not sent to and accepted for clearing within a short, specific period of time must be declared void ab initio. Voiding trades that are not properly and promptly sent to or accepted for clearing—without exception—not only renders bilateral breakage agreements and practices like Post-Trade Name Give-Up unnecessary but also incentivizes SEFs, market participants, middleware providers, and other infrastructure firms to make investments necessary to ensure that trades do not get voided in the first instance.[84]

Trading obviously begins at the point of execution, where market participants require a high degree of certainty that a completed trade will be honored (legally binding). In derivatives markets with fully anonymous execution, participants can have trade certainty only if there is clearing certainty; and they can have clearing certainty only if they know definitively, prior to execution, that the counterparty's guarantor—the FCM—is willing to stand behind the particular transaction. Pre-execution credit checks,[85] therefore, ensure orders are executable before being disseminated.[86] This requires FCM clearing arrangements to be in place with SEF market participants prior to trading and also requires FCM investments in pre-trade credit screening functionalities. It also requires strict regulations and guidance that deny FCMs an ability to reconsider trades once enabled in pre-execution limits.[87]

Pre-execution credit checks, in turn, enable timely acceptance of trades at two critical points in the E2C workflow: (1) the SEF's near real-time submission of the executed trade to the chosen DCO, especially for electronic trades;[88] and (2) the DCO's receipt of the trade information and determination to accept or reject the trade for clearing.[89] With respect to the former, the CFTC's divisions have long provided guidance that SEFs' routing and submission of trades to the DCO should align with the "as quickly as technologically practicable" DCO acceptance standard ("AQATP Standard") but in no event be later than ten minutes following execution.[90] With respect to the latter, the CFTC's divisions have long required DCOs to meet the AQATP Standard by accepting or rejecting submitted trades within 10 seconds.[91] In other words, the STP standards reflect longstanding market practices and regulatory requirements and guidance.[92]

In this STP framework, the practice of Post-Trade Name Give-Up serves no valid risk management purpose. Unlike the uncleared derivatives markets that contributed to the 2008 financial crisis, the SEF market structure and STP reforms now essentially require—usually within seconds of trading—that there be no ongoing relationship (and therefore, no ongoing risk) between counterparties to SEF-traded, cleared swaps. **The CFTC's priority must be to protect those market structure reforms and prevent a handful**

of dealers from cleverly using market power and legacy practices, like Post-Trade Name Give-Up, to get "between the wall and the wall paper," as Forbes once remarked about the wholesale brokerage model in the U.S. treasury markets.[93] Whatever rationale is conjured up to argue against the proposal, the CFTC must reject the fiction that Post-Trade Name Give-Up is a necessary risk management practice, rather than an anticompetitive trading practice designed to impede the transition to a cleared, electronic, and multilateral derivatives market in which all non-dealer market participants can participate in the most liquid SEF order books.

B. The practice of Post-Trade Name Give-Up should be prohibited for all cleared swaps anonymously executed on SEFs.

The CFTC's STP framework eliminates the need for Post-Trade Name Give-Up with respect to all anonymously SEF-executed and cleared swaps. In the market structure explained above, it makes no difference if swaps are anonymously SEF-executed and cleared for economic reasons or for regulatory reasons (i.e., to comply with a clearing or trade execution mandate). **The CFTC must therefore reject specious dealer arguments that undoubtedly will be used to argue for a fallback position narrowing of the scope of the proposed prohibition**, perhaps to apply it only to swaps that are required to be cleared under CEA section 2(h)(1) or swaps that are subject to the trade execution requirement under CEA section 2(h)(8). The CFTC must not limit the prohibition to any subset of anonymously SEF-executed and cleared swaps.

III. The practice of Post-Trade Name Give-Up is inconsistent with the objectives of CEA section 5h(f)(2)(B) and CFTC Regulation 37.202(a).

The practice of Post-Trade Name Give-Up is contrary to the statutory objectives of requiring all market participants to have impartial access to SEFs. CEA section 5h(f)(2)(B) requires SEFs to establish and enforce (and have the capacity to detect, investigate, and enforce) trading, trade processing, and participation rules that deter abuses.[94] That section more specifically requires SEFs to deter abuses by establishing and enforcing rules "to provide market participants with impartial access to the market."[95] Thus, in adopting this Core Principle 2, Congress recognized the potential for derivatives dealers to use commercial leverage to coerce SEFs into abusively limiting access to the SEF markets. In conjunction with CEA section 5h(f)(2)(A)(ii), which requires SEFs to establish and enforce compliance with rules providing "any limitation on access to the [SEF],"[96] CEA section 5h(f)(2)(B) contemplates CFTC oversight of each SEF's access rules and a statutory prohibition on any limitations that prevent "impartial access" to the SEF's liquidity.

In adopting its SEF regulations, the CFTC rejected dealer interpretations that would have allowed SEFs complete discretion to determine whether and how to limit participation on their trading platforms and "reiterate[d] that the purpose of the impartial access requirements is to **prevent a SEF's owners or operators from using discriminatory access requirements as a competitive tool against certain [eligible contract participants]"** ("ECPs").[97] The CFTC reasoned that **"the impartial access requirement allows ECPs to compete on a level playing field, and that the participation of additional liquidity providers will improve the pricing and efficiency of the market and reduce systemic risk."**[98] In pursuit of these objectives, the CFTC interpreted CEA section 5h(f)(2)(B) to permit only limited and impartial trading system access restrictions, for example objective, pre-determined, and minimal criteria that ECPs seeking to execute cleared swaps demonstrate that they are "clearing member[s] of a derivatives clearing organization ("DCO") that clears products traded on that SEF" or have "clearing arrangements in place."[99] Such minimal, impartial conditions on access to SEFs are rational, because the benefits of STP in the E2C workflow depend on each participant in a market having a relationship with and credit from a relevant FCM.

Heeding Congressional concerns about the potential abuse of SEF-access limitations, the CFTC emphasized that "the impartial access requirement of Core Principle 2 does **not allow a SEF to limit access to its trading systems or platforms to certain types of ECPs** . . . as requested by some commenters," including the trade associations representing the derivatives dealers.[100] Instead, it reasoned that Core Principle 2 regulations use the term, "impartial," as "intended in the statute" and in the "ordinary sense of the word: fair, unbiased, and unprejudiced" and "**not anti-competitive**."[101] Accordingly, § 37.202 requires a SEF to provide ECPs[102] with "impartial access to market(s) and market service(s)" but permits only those access limitations that (1) are "impartial, transparent and applied in a fair and non-discriminatory manner"[103] and (2) are **not "intended to prevent or disincentivize participation on a SEF."**[104] Of course, as always, SEF access restrictions also must be consistent with the CEA's core statutory objectives of "disseminating pricing information through trading in liquid, fair, and financially secure trading facilities"[105] and "promot[ing] . . . fair competition among boards of trade, other markets and market participants."[106]

The practice of Post-Trade Name Give-Up frustrates all of the fundamental purposes of the impartial access provisions and the CEA. By permitting dealers to monitor participation on dealer-to-dealer SEFs, collect information on trading strategies, and exit SEF order books with non-dealer trading, Post-Trade Name Give-Up ensures that some market participants—namely, the largest derivatives dealers—compete on an <u>unfair</u> playing field. In turn, by increasing risks and reducing incentives to participate and make markets in SEFs, Post-Trade Name Give-Up also interferes with the statutory mandate to promote fair trading and pre-trade transparency on SEFs,[107] as well as the stated purposes of the impartial access provisions to "allow additional liquidity providers" to participate on SEFs without "anti-competitive" burdens.[108] In light of allegations of retaliation[109] and threatened retaliation[110] against competing liquidity providers, it would be inconceivable for the CFTC to permit the dealers to continue to impose the practice of Post-Trade Name Give-Up on the marketplace.

In addition, we agree that the phrase, "impartial access," does not foreclose the CFTC's consideration of trading practices that solely affect market participants in the post-trade process. The term, "impartial," has ordinary and dictionary meanings that include "treating or ***affecting*** all equally."[111] The term, "access," in turn, has ordinary and dictionary meanings that include the "freedom or ability to obtain or make use of something."[112] In other words, the CEA permits an examination both of explicit conditions on SEF access and the actual ***effects*** trading rules have on "the freedom or ability" of classes of participants to "make use of" the SEFs accessed. **Impartial access has little value in promoting the public interest if market participants are allowed into a market but practically prevented from engaging in competitive trading within that market.**

The CFTC rightly acknowledged this concern in the proposal as follows:

> The practice of post-trade name give-up in isolation may not be discriminatory because participants would generally be eligible to onboard to the SEFs and trade on systems or platforms that equally subject all participants to post-trade identity disclosure. However, **the practice may have resulted in a discriminatory *effect* against certain market participants**. The practice, in turn, may have deterred these participants from joining or trading in a meaningful way on SEFs that facilitate post-trade name give-up, thereby limiting competition on these SEFs. The Commission preliminarily believes that this undermines the policy goals of the impartial access requirement to ensure that market participants can compete on a level playing field and to allow additional liquidity providers to participate on SEFs.[113]

The CFTC acknowledges that impartial access would essentially become a fiction if certain classes of SEF participants could be targeted with trading practices, like Post-Trade Name Give-Up, that not only impose, but are meant to impose, disparate economic costs and trading limitations on competitors once trading system access has been granted.

In this regard, the CFTC must again consider the practice of Post-Trade Name Give-Up in context. Since adoption of the Dodd-Frank Act's derivatives market structure reforms, dealers have used commercial leverage to exact a variety of SEF concessions intended to prevent development of competitive swaps markets. The CFTC's staff, in turn, has found it necessary to play "whack-a-mole" to prevent these dealers from requiring SEFs to establish "enablement mechanisms"[114] and similar means to limit competition. Consider the CFTC staff's explanation of only a few anti-competitive actions that motivated previous impartial access guidance:

> [T]he Divisions have learned that some SEFs provide access to an ECP that is either a liquidity provider or a liquidity taker, but not to an ECP that is both a liquidity provider and taker. Some SEFs also prohibit an individual from obtaining access, even if such individual comes within the definition of an ECP. Other SEFs limit access to ECPs that satisfy minimum transaction volume level requirements; and others require that an ECP be a clearing member or have an agreement with a clearing member to access the SEF even just to trade swaps that are not intended to be cleared.
>
> The Divisions view these ECP qualifications to be inconsistent with the impartial access requirement as they limit access to certain types of ECPs. In addition, the Divisions have learned that some SEFs are allowing only intermediated access to the SEF, while other SEFs are allowing only direct access. The Divisions are concerned that in some circumstances these provisions may impede impartial access.[115]

Post-Trade Name Give-Up must be viewed in this context as a vestigial practice designed to accomplish many of the same ends and frustrate the statutory purpose of requiring impartial access to SEF liquidity.

IV. The practice of Post-Trade Name Give-Up is fundamentally contrary to the policy rationale for certain data privacy protections under CEA section 21(c)(6) and § 49.17.

The practice of Post-Trade Name Give-Up is fundamentally contrary to the policy rationale for certain data privacy protections for counterparty identities under CEA section 21(c)(6) and § 49.17.[116] For the precise reasons explained in Section II above, § 49.17(f)(2) promulgated under CEA section 21(c)(6) prohibits a counterparty to an anonymously SEF-executed, cleared swap from accessing the identity or the legal entity identifier ("LEI") of the other counterparty or its clearing member.[117] In adopting that regulation, the CFTC reasoned as follows:

> When a swap is executed anonymously on a [SEF] or designated contract market ("DCM") and then cleared in accordance with the [CFTC]'s [STP] requirements—such that the counterparties to the swap would not otherwise be known to one another—the identity of each counterparty to the swap and its clearing member for the swap, as well as the [LEI] of such counterparty and its clearing member, is information that is private vis-a-vis the other counterparty to the swap, and this privacy must be maintained by a registered SDR pursuant to CEA section 21(c)(6).
>
> This statutory privacy obligation now operates implicitly to limit the scope of § 49.17(f)(2)—which, accordingly, does not permit a counterparty to a swap that is

> executed anonymously on a SEF or a DCM, and then cleared in accordance with the [CFTC]'s [STP] requirements, to access the identity of the other counterparty to the swap or that counterparty's clearing member for the swap, or the other counterparty's or its clearing member's LEI.[118]

As noted in the above passage, the CFTC's SDR privacy regulations now prevent dealers from accessing counterparty (clearing member) identities or LEIs for anonymously SEF-executed, cleared swaps. The reason is that such identifying information is not needed for legitimate risk management or other purposes.[119]

In the proposal, the CFTC, again rightly, explains that the practice of Post-Trade Name Give-Up "undercuts the intent of this requirement and the congressional objectives underlying CEA section 21(c)(6)."[120] We agree with the CFTC's analysis:

> Allowing a SEF to disclose a counterparty's identity is contrary to the purpose of prohibiting access to this information at an SDR under § 49.17(f)(2), given that a counterparty can [evade this restriction and] obtain this knowledge from another source. Therefore, prohibiting post-trade name give-up would help to advance the objectives underlying the statutory privacy protections under CEA section 21(c)(6) and the [CFTC]'s regulations thereunder that apply to this information.[121]

Unfortunately, in initially adopting this sensible and unambiguous SDR provision, the CFTC left the door open for the dealers to seek from SEFs the information they could not receive from SDRs. The CFTC's prudent attention to ending the end-run around § 49.17(f)(2) by closing the SEF-based Post-Trade Name Give-Up control mechanism is appropriate, reasonable, and long overdue, as well as consistent with its existing STP and data privacy frameworks.

V. The practice of Post-Trade Name Give-Up enables dealers to glean order book trading information from market participants and thereby disadvantages would-be market-makers and liquidity takers.

Most order book trading in the swaps markets is conducted on dealer-to-dealer SEFs that enforce the practice of Post-Trade Name Give-Up. As we explained above, the largest derivatives dealers have coerced SEFs into maintaining the practice by threatening to take liquidity elsewhere should non-dealer trading be introduced to the interdealer SEF order books. The deliberate consequence has been the fragmentation of market liquidity, and a systematic collection of trading interest and trade information that permits dealers not only to police access to privileged liquidity but to guarantee themselves informational advantages in the markets.

This unfair gleaning of trading interest and trade information violates multiple CEA provisions and statutory objectives. First, it squarely contravenes the objectives of the SEF framework. The CFTC required SEFs to provide market participants an option to anonymously trade swaps on order books, among other modes of execution, as part of a framework designed to increase pre-trade transparency and promote trading on SEFs.[122] That, in combination with other elements of the Dodd-Frank Act's execution framework (e.g., STP requirements discussed above), was meant to permit market participants to choose to transact with the largest number of willing and available counterparties, while controlling the extent of trading interest and trade information disclosed to other participants in the market. The practice of Post-Trade Name Give-Up discourages use of that order book option as intended, all but forcing trading into disclosed RFQs and limiting pre-trade transparency and the trading of non-dealer liquidity providers on SEFs.

In addition, the gleaning of trading interest and trade information and the apparent consequences of the practice of Post-Trade Name Give-Up—to permit dealers to exit order books with non-dealer participation and trade with informational advantages—conflict with the CEA's overarching statutory objectives to "promote . . . fair competition among boards of trade, other markets and market participants"[123] and to "disseminate pricing information through trading in liquid, fair, and financially secure trading facilities."[124] They similarly violate SEF Core Principle 11, which provides that "unless necessary or appropriate to achieve the [CEA's] purposes," SEFs "shall not adopt any rules or take any action that result in any unreasonable restraint of trade or impose any material anticompetitive burden on trading or clearing."[125] The practice of Post-Trade Name Give-Up undermines, rather than advances, the SEF framework's statutory objectives, as noted above, and it represents an obviously unreasonable restraint of trade and material anticompetitive burden on trading. In RFQ and order book trading monitored by the dealers, trading interest and strategies are mostly disclosed to the advantage of four BHCs comprising more than 87% of the $201 trillion U.S. market.[126] The practice of Post-Trade Name Give-Up simultaneously entrenches those dominant dealers and prevents competing liquidity providers from trading in the most liquid markets.

SIFMA contends that Post-Trade Name Give-Up is an acceptable practice, because "participants in anonymous order books with PTNGU understand the rules of those order books up front and, specifically, it is understood that their identity will be revealed to their counterparty."[127] SIFMA also states that counterparties "choose to trade [on SEFs with Post-Trade Name Give-Up] with that knowledge and, in fact, *value this feature*."[128] First, SEFs have been coerced into adopting the practice of Post-Trade Name Give-Up by the dealers essentially owning the market and providing a very significant amount of its current liquidity. For buy-side market participants, and particularly those in need of significant liquidity, there is no practical choice to simply take business to a SEF without Post-Trade Name Give-Up, as there would be no dealer-provided liquidity at that SEF due to anti-competitive freeze-outs that dealers have conspired to create. Moreover, SIFMA provides no evidence to support the proposition that SEFs and counterparties "value this feature" of Post-Trade Name Give-Up, which contradicts not just some—but literally all—of the administrative record before the CFTC.

VI. Conclusion

Better Markets commends the CFTC for taking critical initial steps to improve the swaps market structure by prohibiting the practice of Post-Trade Name Give-Up. That prohibition would be (1) consistent with statutory and regulatory objectives, (2) increase and diversify liquidity in the swaps markets, (3) facilitate impartial access to SEFs, and (4) protect market integrity by preventing the largest U.S. derivatives dealers from gleaning trading interest and trade information. Moreover, these and other benefits would come "at or near zero" cost,[129] as the CFTC rightly has estimated in considering the costs and benefits of the proposal. In addition, we reiterate the following critical point: **Post-Trade Name Give-Up does not support any legitimate risk management objective in connection with cleared, anonymously executed swaps.** Again, the sole commenter favoring the practice, SIFMA, in no way contradicts this fact and even notes that its own dealer members could not agree that the practice was beneficial.

Nevertheless, the market power of a very small number of U.S. derivatives dealers has prevented SEFs from implementing such a prohibition without regulatory intervention. This is due, in part, to the commercial dependence SEFs have on dealers providing the vast majority of liquidity to their markets. But it is also due to even more direct financial and governance controls and conflicts of interest. In this regard, we feel compelled to note that the CFTC has failed to exercise its authority to implement statutory provisions intended to mitigate such controls and conflicts of interest on SEFs, including, as appropriate, through "numerical limits on the control of, or the voting rights with respect to," SEFs by swap dealers and certain BHCs.[130] **Congress directed ownership and conflict-of-interest regulations be completed seven years ago, with a specific view towards ameliorating, if not ending, the anti-competitive and anti-**

market hegemony of the largest BHCs with swaps dealers active in the U.S. derivatives markets.[131] The CFTC has never finalized its proposed regulations, which are necessary to address controls and conflicts of interest.[132]

To remedy competition concerns in the U.S. derivatives markets, the CFTC must look beyond the current proposal and prioritize reasonably designed governance and conflicts-of-interest regulations. Consider the ISDA General Disclosure Statement for Transactions used by the dealers in the swaps markets, which acknowledges potential conflicts of interest with respect to trading on SEFs (and use of other registrants, like DCOs):

> **We may have an ownership or other economic interest (such as the right to receive payment for order flow, reporting or other fees) in a swap execution facility**, designated contract market, national securities exchange, or other trading venue on which Transactions may be executed. We may have ownership or other economic interests in a clearinghouse to which a Transaction executed between us could be submitted or given up for clearing. We may have access to one or more trading venues or clearinghouses and not others. **Our directors or employees may serve as directors of one or more trading venues or clearinghouses. In such cases, we may derive financial or other benefits if your Transaction is executed and/or cleared at such venue or clearinghouse.** Conversely, it may be financially advantageous for us if a Transaction is executed bilaterally and not cleared (applicable law permitting). For example, if a Transaction is not cleared, we may incur lower funding costs, derive a funding benefit or face more favorable market conditions in which to hedge our exposure resulting from a Transaction.[133]

In addition, consider the following Material Conflicts of Interest Disclosure, Annex A, circulated by one major dealer:

> You also should be aware that Swap Dealer or an affiliate may own stock in, or have some other form of ownership interest in, one or more U.S. or foreign Trading Facilities or DCOs where your transactions in Contracts may be executed and/or cleared. As a result, Swap Dealer or an affiliate may receive financial or other benefits related to its ownership interest when Contracts are executed on a given Trading Facility or cleared through a given DCO, and Swap Dealer would, in such circumstances, have an incentive to cause Contracts to be executed on that Trading Facility or cleared by that DCO. In addition, directors, officers and employees of Swap Dealer or an affiliate may also serve on the board of directors or on one or more committees of a Trading Facility or DCO.
>
> In addition, Trading Facilities and DCOs may from time to time have in place other arrangements that provide their members or participants with volume, market-making or other discounts or credits, may call for members or participants to pre-pay fees based on volume thresholds, or may provide other incentives or arrangements that are intended to encourage market participants to trade on, or direct trades to, that Trading Facility or DCO. Swap Dealer or an affiliate may participate in and obtain financial benefits from such incentive programs.[134]

All major dealers note the possibility of such conflicts of interest, without more specific disclosures with respect to the trading venues and clearing organizations in which they have interests, control mechanisms, or financial incentives. Moreover, such ownership stakes, mechanism, and incentives are not publicly disclosed as part of a SEF's registration process, leaving the public with almost no understanding of how reasonable governance or ownership limitations might limit conflicts of interest and improve the derivatives market structure.

For all of these reasons, we encourage the CFTC to heed the U.S. Department of Justice, given its experience investigating anti-competitive actions:

> The Department [of Justice] supports the imposition of individual ownership limits on DCMs/SEFs . . . [L]imiting aggregate ownership and imposing stringent governance requirements on DCMs/SEFs may prevent the emergence of a dominant trading platform controlled by major dealers to the detriment of other market participants. The creation of such a platform would be roughly analogous to the three or five largest airlines controlling all landing rights at every U.S. airport—the big carriers could use this control to disadvantage smaller carriers by restricting landing rights or raising their rivals' costs to access the airports.
>
> **In the derivatives context, participating dealers might use such a platform to exclude rival dealers or other market participants that would otherwise compete for trading volume.** A dealer-controlled trading platform also might release less innovative data products or be less transparent than would an independent platform. Further, major dealers might use their control of a dominant trading platform to disadvantage rivals by refusing to trade their products or to continue trading over the counter even in instances where exchange trading is feasible. This latter issue might arise even though the CFTC has considerable authority to mandate central clearing of contracts. To the extent that dealers attempt to elude this authority by refusing to trade certain centrally cleared contracts in order to maintain markets in similar, over-the-counter contracts, aggregate ownership caps on Enumerated Entities and governance restrictions on DCMs/SEFs can serve as a backstop to protect competition.
>
> Appropriate governance and ownership restrictions also might heighten competition among DCMs/SEFs themselves. For example, an aggregate ownership cap might lead to the creation of multiple DCMs/SEFs, each sponsored by a dealer or two, in competition with each other. Such competition would benefit market participants in several respects: trading fees would likely decline, and price competition would likely be complemented by vigorous innovation, bringing market participants faster execution times and new data products.[135]

The U.S. Department of Justice raises complex issues in its comment letter that are beyond the scope of our current comment letter and the CFTC's current proposal. However, we fundamentally agree that the CFTC must take swift action to implement reasonable ownership, governance, and conflicts-of-interest regulations.

Sincerely,

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1 Better Markets is a non-profit, non-partisan, and independent organization founded in the wake of the 2008 financial crisis to promote the public interest in the financial markets, support the financial reform of Wall Street, and make our financial system work for all Americans again. Better Markets works with allies—including many in finance—to promote pro-market, pro-business, and pro-growth policies that help build a stronger, safer financial system, one that protects and promotes Americans' jobs, savings, retirements, and more.

2 See CFTC, Post-Trade Name Give-Up on Swap Execution Facilities, 84 Fed. Reg. 72262 (Dec. 31, 2019), available at https://www.govinfo.gov/content/pkg/FR-2019-12-31/pdf/2019-27895.pdf. See also CFTC, Post-Trade Name Give-Up on Swap Execution Facilities, 83 Fed. Reg. 61571 (Nov. 30, 2018), available at https://www.gpo.gov/fdsys/pkg/FR-2018-11-30/pdf/2018-24643.pdf.

3 Office of the Comptroller of the Currency, Quarterly Report on Bank Trading and Derivatives Activities, Third Quarter 2019 (Dec. 2019), available at https://www.occ.gov/publications-and-resources/publications/quarterly-report-on-bank-trading-and-derivatives-activities/files/pub-derivatives-quarterly-qtr3-2019.pdf (noting that "[a] small group of large financial institutions continues to dominate trading and derivatives activity in the U.S. commercial banking system" and that "four large commercial banks represented 87.2 percent of the total banking industry notional amounts and 83.2 percent of industry net current credit exposure").

4 Bank for International Settlements, Statistical release: OTC derivative statistics at end-June 2019 (Nov. 8, 2019), available at https://www.bis.org/publ/otc_hy1911.pdf (noting that "[l]arge dealers in advanced economies (AEs), who report data to the semiannual survey, accounted for the overwhelming majority (92% of notional amounts, 87% of gross market value) of outstanding positions at end-June 2019").

5 That percentage figure reflects $113.87 billion of the total customer segregated funds for swaps of $118.504 billion. See CFTC, Selected FCM Financial Data as of November 30, 2019 from Reports Filed by December 24, 2019, available at https://www.cftc.gov/sites/default/files/idc/groups/public/%40financialdataforfcms/11-%20FCM%20Webpage%20Update%20-%20November%202019.pdf.

6 See Basel Committee on Banking Supervision ("BCBS"), Committee on Payments and Market Infrastructures ("CPMI"), Financial Stability Board ("FSB") et al., Incentives to centrally clear over-the-counter (OTC) derivatives, 3 (Nov. 19, 2018) (noting that "[t]he provision of client clearing services is concentrated in a relatively small number of bank-affiliated clearing firms"), available at https://www.bis.org/publ/othp29.pdf. This clearing concentration is also a serious systemic risk concern, because each of the BHCs and affiliates continue to maintain complex interconnections between financial markets and remain critical to the functioning of clearing, data, settlements, custodial, and payments infrastructure. See, e.g., Oliver Wyman and World Federation of Exchanges, The Future of Clearing, 21 (2019) (noting that "[t]he largest 11 clearing members (out of 306, as measured by prefunded financial resources contributions to the [central counterparties]) are connected to between 16 and 25 [central counterparties]"), available at https://www.oliverwyman.com/content/dam/oliver-wyman/v2/publications/2019/apr/The-Future-Of-Clearing.pdf. These dealers compete for a relatively concentrated cleared swaps customer base as well. In fact, by one measure, "[t]he 50 largest clients represent more than half of all [global] client margin, even though there are over 1,800 clients in total." BCBS, CPMI, and FSB et. al, at 23.

7 See Chart 1 in Section I supra.

8 The class action complaint alleges a number of anti-competitive and anti-market efforts by credit derivatives dealers, including efforts to limit access to clearing and data infrastructure and to limit pre and post-trade transparency in the OTC derivatives markets. See In Re Credit Default Swaps Antitrust Litigation, U.S. District Court SDNY, 13 MD 2476 (Jan. 31, 2014), available at https://data.bloomberglp.com/assets/sites/2/CDS-antitrust-litigation-complaint-pt-1.pdf (noting that credit derivatives dealers "threatened the [interdealer brokers] with losing their business—which would effectively destroy them—if they facilitate [credit default swap] transactions with non-dealers" and alleging that the dealers essentially "acted as a cartel to preserve their continued control over [credit default swap] pricing and other critical information"). See also P. Gilmartin, Multibank Settlement in CDS Manipulation Suit, Rev. of Banking & Fin. Law, Vol. 35, 470, 472 (2015-16) (noting that the $1.864 billion private antitrust settlement was one of the largest in history), available at https://www.bu.edu/rbfl/files/2016/10/Pages-from-Development-Articles-Formatted-4.pdf. See also In re Interest Rate Swaps Antitrust Litigation, U.S. District Court SDNY, Class Action Complaint (Nov. 25, 2015) (citing SEFs as adopting Post-Trade Name Give-Up in the interest of "not biting the hand that feeds you," observing that dealers have "blocked the development of SEF order books through name give-up," alleging that "SEFs that have attempted to abolish name give-up have received threats from" dealers, and quoting the CFTC chairman as stating "no individual SEF can afford to be the first to prohibit name give-up practices" because of "potential retaliatory action"), available at http://nylawyer.nylj.com/adgifs/swaps_complaint.pdf.

9 See K. Bretell, Banks' pressure stalls opening of US derivatives trading platform, Reuters (Aug. 27, 2014) (reporting that GFI "dropped plans for fully anonymous [credit derivatives] trading," that it had to "change terms of its trading," and that "multiple funds that planned to participate have pulled out after they came under pressure from some large banks" and noting that "some banks are using their clout to throw up barriers that range from adverse pricing policies, slowing technological innovation and warning [a number of hedge funds and other firms] that they may lose access to client markets if they trade on interdealer venues"), available at http://www.reuters.com/article/2014/08/27/usa-derivatives-banks-idUSL1N0QW1T220140827; See, similarly, K. Burne, CFTC to Propose Swaps Anonymity, Wall St. J. (Feb. 17, 2015) (reporting that "[w]hen broker GFI Group Inc. began rolling out a new [anonymous] trading system a year ago, officials received heated phone calls from executives at Credit Suisse Group and JP Morgan" and noting that "[t]he banks' beef" was that "GFI's system kept traders' identities a secret, upending the long-held practice on broker-run swaps platforms, where participants typically disclosed their identities"), available at https://www.fnlondon.com/articles/cftc-proposes-anonymity-for-traders-in-swaps-market-20150217. See also P. Madigan, Massad: Sefs fear retaliation if they end name give-up (Apr. 23, 2015), available at https://www.risk.net/regulation/dodd-frank-act/2405534/massad-sefs-fear-retaliation-if-they-end-name-give. See also L. Story, A Secretive Banking Elite Rules Trading in Derivatives, N.Y. Times (Dec. 11, 2010) (outlining various mechanisms the largest derivatives dealers have used to maintain hegemony in the derivatives markets), available at https://www.nytimes.com/2010/12/12/business/12advantage.html; See also M. Kentz, Dealers ease stance on naming swap counterparties, Reuters (Mar. 23, 2015) (reporting that "[d]ealers had worked behind the scenes to maintain the practice [of Post-Trade Name Give-Up] as a way of protecting access to dealer-only pools of liquidity"), available at https://www.reuters.com/article/swaps-derivatives-regulations/dealers-ease-stance-on-naming-swap-counterparties-idUSL2N0WP0W020150323.

10 According to reporting on a 2016 Greenwich Associates paper, Quantifying Interest-Rate Swap Order Book Liquidity, "buy-side traders could witness price improvement if they check order-book liquidity [in interest rate markets] prior to their request for quote," specifically as "order books' midpoint prices were better than the RFQ executions 92% of the time." K. McPartland, Greenwich Associates, Quantifying Interest-Rate Swap Order Book Liquidity (Mar. 9, 2016), available at https://www.greenwich.com/fixed-income-fx-cmds/quantifying-interest-rate-swap-order-book-liquidity. See also R. Daly, SEF Order Books Spur Price Improvement (Mar. 15, 2016) (caveating that "market structure issues like the lack of post-trade anonymity and average price as well as longstanding relationship concerns" may prevent some members of the buy-side from accessing the

better pricing on interest rate swaps order books), available at https://www.marketsmedia.com/sef-order-books-spur-price-improvement/.

11 Dealers exercise market power to prevent other efficiencies from arising in the swaps markets. For example, despite capital incentives for individual dealers and commercial incentives for SEFs and clearinghouses to migrate transactions into the Dodd-Frank Act's derivatives market structure, significant segments of the swaption, cross-currency swap, foreign exchange option, and non-deliverable forward markets remain uncleared and mostly dealer intermediated and controlled. See, e.g., Clarus Financial Technology, What is Left Uncleared in 2018? (Dec. 12, 2018), available at https://www.clarusft.com/what-is-left-uncleared-in-2018/.

12 See, e.g., CFTC, Swap Execution Facility Requirements and Real-Time Reporting Requirements, 85 Fed. Reg. 9407 (proposed Feb. 19, 2020), available at https://www.govinfo.gov/content/pkg/FR-2020-02-19/pdf/2020-02721.pdf. In that release, the CFTC rightly notes that "nearly seventy percent of U.S. Dollar interest rate swaps trading in the inter-dealer swap market were carried out as part of just a single type of package transaction: U.S. Dollar Spreadover package transactions." Id at 9411, fn. 33. See also Chris Barnes, USD Spreadovers and SEF Market Share, Clarus Financial Technology Blog (August 14, 2018), available at https://www.clarusft.com/usd-spreadovers-and-sef-market-share/. The CFTC further notes that "package transactions involving spreads and butterflies of interest rate swaps make up a material amount of trading in the swaps markets." CFTC, Swap Execution Facility Requirements and Real-Time Reporting Requirements, 85 Fed. Reg. 9407, 9411, fn. 33 (proposed Feb. 19, 2020). However, the CFTC wrongly proposes exemptions from the trading protocols otherwise applicable to certain components of package transactions, which will only reduce liquidity on SEFs and increase the pricing control of dealers in contravention of the Commodity Exchange Act's explicit objectives for the SEF regulatory framework. See fn. 15 infra.

13 See Letter from Better Markets to the CFTC, Public Comment on Swap Execution Facilities and Trade Execution Requirement (RIN 3038-AE25); Public Comment on Request for Comment on Post-Trade Name Give-Up on Swap Execution Facilities (RIN 3038-AE79), Section II.A. (Mar. 15, 2019) (demonstrating that "[t]he CFTC's misconstruction of the SEF registration requirement continues to violate the letter and intent of the CEA section 5h(a)(1)" and that "[s]ingle-dealer facilities for the trading of swaps must register as SEFs and transform their operations to comply with the CEA's SEF definition and core principles"), available at https://bettermarkets.com/sites/default/files/Better%20Markets%20Comment%20Letter%20on%20Swap%20Execution%20Facilities%20and%20Trade%20Execution%20Requirement_0.pdf.

14 Public Law 111-203, 124 Stat. 1376 (2010). Although there has been a pronounced trend toward clearing interest rate and credit derivatives since the passage of the Dodd-Frank Act, the CFTC's exceptions and exemptions from clearing have been one of multiple contributing factors that has made total clearing as a percentage of notional outstanding, on average, only 62% of interest rate derivatives across categories and 45% of index credit derivatives across categories, as of November 2018. That does not account for the much lower clearing percentages for other categories, including non-deliverable forwards, certain options, and foreign exchange instruments, as mentioned in fn. 11 supra. See Basel Committee on Banking Supervision, Committee on Payments and Market Infrastructures, Financial Stability Board et al., Incentives to centrally clear over-the-counter (OTC) derivatives (Nov. 19, 2018). The hyperlink to this paper can be found in fn. 6 supra.

15 CEA section 5h(e); 7 U.S.C. 7b–3(e) (stating that "[t]he goal of this [SEF] section is to promote the trading of swaps on swap execution facilities and to promote pre-trade transparency in the swaps market").

16 See Letter from the Securities Industry and Financial Markets Association ("SIFMA") to the CFTC, Post-Trade Name Give-Up on Swap Execution Facilities; Request for Comment—RIN 3038-AE79, 83 Fed. Reg. 61751 (Nov. 30, 2018) (stating that "[a]lthough **the views among our swap dealer members on PTNGU are not uniform**, a majority of those ***who have expressed a view*** believe that PTNGU is important to the market and that its prohibition may impair participants' abilities to manage risk and provide liquidity") (emphasis added), available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62098&SearchText=.

17 In re: Credit Default Swaps Antitrust Litigation, Stipulation and Agreement of Settlement with International Swaps and Derivatives Association, U.S. District Court SDNY, 13 MD 2476, at 43 (DLC) (filed Oct. 16, 2015).

18 Id.

19 See CFTC, Post-Trade Name Give-Up on Swap Execution Facilities, 83 Fed. Reg. 61571 (Nov. 30, 2018). The hyperlink to the request-for-comment can be found in fn. 2 supra.

20 Id.

[21] Proposed § 37.9(d)(1). CFTC, Post-Trade Name Give-Up on Swap Execution Facilities, 84 Fed. Reg. 72262, 72272 (Dec. 31, 2019).

[22] Proposed § 37.9(d)(2). CFTC, Post-Trade Name Give-Up on Swap Execution Facilities, 84 Fed. Reg. 72262, 72272 (Dec. 31, 2019).

[23] See fn. 58 infra for discussion of Goldman Sach's comments in the CFTC's April 2015 Market Risk Advisory Committee Meeting.

[24] Goldman Sachs Asset Management participated in at least two ex parte meetings with the Securities Industry and Financial Markets Association, Asset Management Group ("SIFMA AMG"), apparently discussing the merits of SIFMA AMG's comment letter supporting a CFTC prohibition on Post-Trade Name Give-Up. See Ex Parte Meeting for Proposed Rule 83 FR 61571, No. 1340 (Mar. 4, 2019), available at https://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=1340&SearchText=; See also Ex Parte Meeting for Proposed Rule 83 FR 61946, No. 1413 (Mar. 4, 2019), available at https://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=1413&SearchText=.

[25] See Letter from the Securities Industry and Financial Markets Association to the CFTC, Post-Trade Name Give-Up on Swap Execution Facilities; Request for Comment—RIN 3038-AE79, 83 Fed. Reg. 61751 (Nov. 30, 2018). The hyperlink can be found in fn. 16 supra.

[26] See Id, at 6 (stating "certain package transactions involving securities (such as U.S. Treasury swap spreads) or non-cleared swaps typically necessitate PTNGU to address the risks associated with the non-cleared legs of those transactions"). Compare to Goldman Sachs, CFTC Market Risk Advisory Committee Meeting (Apr. 2, 2015), at 148 (contending that "there's substantial risk on those package trades with whom to execute the Treasury" leg and stating that "[s]o long we're in that world, particularly for package trades, [Goldman] get[s] very nervous about name give-up").

[27] CFTC, Post-Trade Name Give-Up on Swap Execution Facilities, 84 Fed. Reg. 72262, 72263 (Dec. 31, 2019).

[28] Letter from Vanguard to the CFTC, Swap Execution Facilities and Trade Execution Requirement (RIN 3038-AE25) (March 15, 2019) (emphasizing that "[n]ame give-up for cleared swaps is unnecessary and risks information leakage as to participants' positions, strategies, and other sensitive information" and agreeing that "[i]n the cleared swaps market . . . ongoing obligations and risks [that justified the practice in uncleared transactions] no longer exist once [a swap is] accepted by a DCO for clearing, as both parties . . . face the DCO"), available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62090&SearchText=. See also Ex Parte Meeting for Proposed Rule 83 FR 61571, No. 1340 (Mar. 4, 2019) (participating with others that publicly oppose Post-Trade Name Give-Up), available at https://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=1340&SearchText=.

[29] CFTC Market Risk Advisory Committee Meeting (Apr. 2, 2015), at 133 (stating that "[t]he way we execute trades and the market structure and how we interact with the market has not changed except it's become more expensive" under the SEF framework, emphasizing that "[t]he biggest issue when I talk to my colleagues on the buy-side is the issue of name give-up," and asking the CFTC to focus on reforming markets and facilitating order book liquidity by ensuring anonymous trading), available at https://www.cftc.gov/sites/default/files/idc/groups/public/@aboutcftc/documents/file/mrac_040215_transcript.pdf.

[30] Id, at 145-6 (explaining that Post-Trade Name Give-Up is "a legacy practice of when these markets were uncleared, when you needed to know who your counterparty was," which is "not true anymore," and encouraging necessary government action to "get rid of [Post-Trade Name Give-Up] and then see what competition does"). See also Ex Parte Meeting for Proposed Rule 83 FR 61571 (Feb. 26, 2019) (participating with other firms known to oppose the practice of Post-Trade Name Give-Up), available at https://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=1332&SearchText=.

[31] Id, at 152-153 (explaining that Bloomberg SEF is "fully anonymous pre- and post-trade" and that it does not "use middleware in our order book for the explicit reason to preserve post-trade anonymity" and emphasizing that the order book and rulebook is structured in that way "because that is what nearly all of our buy-side expressed as a desire").

[32] Letter from SIFMA Asset Management Group ("SIFMA AMG") to CFTC, Swap Execution Facilities and Trade Execution Requirement Proposed Rule and Post-Trade Name Give-up on Swap Execution Facilities (RIN 3038-AE25 and RIN 3038-AE79) (Mar. 15, 2019) (addressing specious contentions by the dealers that Post-Trade Name Give-Up is necessary to allocate capital efficiently and avoid "gaming," noting that "post-trade name give-up leads to uncontrolled information leakage" that deters participation in the swaps markets, and anticipating that a prohibition would "result in deeper liquidity pools on SEFs and promote

the development of more open, competitive, and less fragmented markets”), available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62074&SearchText=. See also Ex Parte Meeting for Proposed Rule 83 FR 61571, No. 1340 (Mar. 4, 2019) (participating with others that publicly oppose Post-Trade Name Give-Up), available at https://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=1340&SearchText=.

33 Letter from the Managed Funds Association (“MFA”) to CFTC, Post-Trade Name Give-Up on Swap Execution Facilities (RIN Number 3038-AE79) (Mar. 15, 2019) (observing that “trading venues provide anonymous execution in equities, futures, foreign exchange, and Treasuries, among others, without name give-up,” noting that the practice is “a significant impediment to investors being able to trade on anonymous order books that have historically served the ‘dealer-to-dealer’ segment of the market, thereby operating as a restraint of trade and an anticompetitive burden,” and explaining that it “functions as a source of uncontrolled information leakage for investors[,] . . . can be used as a policing mechanism by dealers to deter buy-side participation [in anonymous order books],” and limits “access the unique liquidity pools and trading protocols offered by SEFs that historically served the ‘dealer-to-dealer’ segment of the market, reducing pre-trade transparency . . . [and] choice of trading protocols), available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62035&SearchText=. See also MFA, MFA Position Paper: Why Eliminating Post-Trade Name Disclosure Will Improve the Swaps Market (March 31, 2015), available at https://www.managedfunds.org/wp-content/uploads/2015/04/MFA-Position-Paper-on-Post-TradeName-Disclosure-Final.pdf; See also MFA, Petition for Rulemaking to Amend Certain CFTC Regulations in Parts 1 (General Regulations under the Commodity Exchange Act), 39 (Derivatives Clearing Organizations, Subpart B – Compliance with Core Principles) and 43 (Real-Time Public Reporting) to CFTC (Oct. 22, 2015), available at https://www.managedfunds.org/wp-content/uploads/2015/10/CFTC-Petition-for-SEF-Rules-Amendments-MFAFinal-Letter-with-Appendix-A-Oct-22-2015.pdf.

34 Letter from the Investment Company Institute (“ICI”) to the CFTC, Post-Trade Name Give-Up on Swap Execution Facilities (RIN 3038-AE79) (Jan. 29, 2019) (stating that “post-trade name give-up is unnecessary and harms regulated funds and their shareholders,” asking the CFTC to “abolish this practice to improve competition, fairness, liquidity, and efficiency in the swaps markets,” confirming that “applicable pre-execution credit checks and straight-through processing requirements effectively eliminate . . . counterparty risk as well as the need for market participants to know the identities of the counterparties to [a] [cleared] SEF-executed or alpha transaction,” explaining that “[p]ost-trade name give-up institutionalizes a form of information leakage that results in less favorable trading conditions for regulated funds,” and anticipating that “buy-side traders would be more likely to participate in trading on venues that offer anonymous execution of intended to be cleared swaps, including venues that offer order book functionality)”, available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61943&SearchText=.

35 Letter from UBS Securities, LLC to the CFTC, Re: Post-Trade Name Give-Up on Swap Execution Facilities, RIN number 3038-AE79 (Mar. 21, 2019) (stating that “UBS has consistently voiced its opposition to post-trade name give-up” and that the practice “operates as a disincentive to certain market participants to trade on otherwise anonymous limit order book SEFs”), available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62097&SearchText=. See also CFTC Market Risk Advisory Committee Meeting (Apr. 2, 2015), at 138, 144 (explaining that UBS’ clients find “post-trade name give-up and impartial access” to be the most critical areas in need of trade execution reform and noting that “in terms of thinking about impartial access, attracting more participants to SEFs, [market participants] should have a choice on whether they want to remain anonymous and in some cases to potentially prevent information leakage”).

36 See Ex Parte Meeting for Proposed Rule 83 FR 61571, No. 1340 (Mar. 4, 2019) (participating with others that publicly oppose Post-Trade Name Give-Up), available at https://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=1340&SearchText=.

37 Id.

38 Id.

39 Letter from Eleven Federal Home Loan Banks, Response to Request for Comments on Post-Trade Name Give-Up on Swap Execution Facilities (Jan. 29, 2019) (stating that “post-trade name give-up is unnecessary for swaps [anonymously executed on a central limit order book and intended to be cleared] and that the practice undermines the overall policy goal of [the Dodd-Frank Act] of ensuring impartial access to SEFs,” explaining that straight-through processing has improved execution-to-clearing workflows so that acceptance for clearing “typically occurs within seconds,” which eliminates the need for Post-Trade Name Give-Up, observing the development of “a two-tiered market” that “entrenches” dealer roles as “exclusive price makers” by practically limiting customer participation on the most liquid order books, and noting that “[r]emoving post-trade name give-up will be a step toward allowing for competitive, un-fragmented markets to develop, in which there are more participants in [central limit order books] and, therefore deeper pools of liquidity and better pricing”), available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=61944&SearchText=.

[40] See also CFTC Market Risk Advisory Committee Meeting (Apr. 2, 2015), at 153-4 (stating that "the net impact on pricing and liquidity from eliminating post-trade name give-up would be overwhelmingly positive," explaining that "the consequence of inaction will be progressive liquidity impairment in the marketplace," and suggesting that "the [market] structure we have today confines any buy-side market participant to a permanent price taker role").

[41] See Ex Parte Meeting for Proposed Rule 83 FR 61571, No. 1340 (Mar. 4, 2019) (participating with others that publicly oppose Post-Trade Name Give-Up), available at https://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=1340&SearchText=.

[42] See fn. 24 supra.

[43] Letter from the Futures Industry Association Principal Traders Group, RIN 3038-AE79: Post-Trade Name Give-Up on Swap Execution Facilities (Mar. 14, 2019) (stating that "there is no legitimate reason to disclose counterparty names post-execution for anonymously executed cleared swaps, as trading counterparties face the CCP and do not have any credit, operational, or legal exposures to each other" explaining that "[t]he lack of justification for post-trade name give-up is evident based on experience in other asset classes (such as futures, cash Treasuries, and equities), where cleared products are anonymously executed without any disclosure of counterparty names," and emphasizing that "post-trade name give-up could be used as a barrier to entry that allows incumbent liquidity providers to monitor whether new liquidity providers are seeking to enter the cleared swaps market"), available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62019&SearchText=. See also CFTC Market Risk Advisory Committee Meeting (Apr. 2, 2015), at 162-4 (stating that "there are definitely more market makers out there that are interested to provide liquidity" in the proper market structure but cautioning that "name give-up is also one of the things that I think is a problem," because it "gives away some of the strategies used to price your products and . . . also gives away some of the positions that you may hold in regards to the swaps that you may hold in regards to the swap you've traded, which does not help you").

[44] See Ex Parte Meeting for Proposed Rule 83 FR 61571 (Feb. 26, 2019), No. 1332 (participating with others that publicly oppose Post-Trade Name Give-Up, available at https://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=1332&SearchText=.

[45] Id.

[46] Indeed, we and the identified market participants disagree on a host of other public policy issues, including numerous elements of the CFTC's 2018 proposal to reform the SEF markets, and they disagree with each other.

[47] See Letter from Better Markets to the CFTC, Public Comment on Swap Execution Facilities and Trade Execution Requirement (RIN 3038-AE25); Public Comment on Request for Comment on Post-Trade Name Give-Up on Swap Execution Facilities (RIN 3038-AE79), at 2 (Mar. 15, 2019) (concisely stating our position in this comment letter). The hyperlink to this comment letter is available in fn. 13 supra. See also Better Markets, Stopping Wall Street's Derivatives Dealers Club, Policy Brief (Feb. 2016), available at https://bettermarkets.com/sites/default/files/Better%20Markets%20Policy%20Brief%20-%20Stopping%20Wall%20Street%E2%80%99s%20Derivatives%20Dealers%20Club.pdf.

[48] See, e.g., P. Gilmartin, Multibank Settlement in CDS Manipulation Suit, Rev. of Banking & Fin. Law, Vol. 35, 470, 478 (2015-16), citing Declaration of Stanford University Professor Darrell Duffie in Support of Plaintiffs' Motion for Preliminary Approval of Settlement with all Defendants and Preliminary Certification of a Settlement Class at 4, In Re Credit Default Swaps Antitrust Litig., No. 1:13-md-02476, 2014 U.S. Dist. LEXIS 123784 (S.D.N.Y. Sept. 4, 2014) ("Anonymity is a critical component of exchange trading platforms because it allows entities to transact without disclosing their trading strategies to the wider market. The practice of name disclosure, accordingly, deters buy-side firms from trading on platforms with exchange-like features. The elimination of the practice of name disclosure would thus, in my view, significantly increase incentives for participation on new or existing CDS trading platforms with exchange-like features."). The hyperlink is available in fn. 8 supra. See also Expert Report of Dr. Mark Grinblatt, University of California at Los Angeles, 1:16-md-02704-PAE, Document 725-1 (Mar. 7, 2019) (opining that Post-Trade Name Give-Up, in part, "prevent[ed] [interest rate swaps] from evolving to an all-to-all market structure" and determining that in the absence of anti-competitive dealer actions, "spread compression for [IRS] instruments would be substantial, and at least, conservatively measured, within the range of approximately 80%" and even affect spreads on non-SEF markets), available at https://www.docketbird.com/court-documents/In-re-Interest-Rate-Swaps-Antitrust-Litigation/Exhibit-1-Expert-Report-of-Professor-Mark-Grinblatt/nysd-1:2016-md-02704-00725-001.

[49] See, generally, the "benefits" discussion in Section V. Related Matters in CFTC, Post-Trade Name Give-Up on Swap Execution Facilities, 84 Fed. Reg. 72262, 72269-72271 (Dec. 31, 2019), available at https://www.govinfo.gov/content/pkg/FR-2019-12-31/pdf/2019-27895.pdf.

50 IHS Markit submitted a comment letter noting that it has offered a "no-name give up workflow option . . . since October 2, 2013," which presumably could be adopted as an off-the-shelf solution at minimal cost and effort relative to benefits of facilitating anonymous SEF trading without Post-Trade Name Give-Up. See Letter from IHS Markit to CFTC, Re: Post-Trade Name Give-Up on Swap Execution Facilities, Request for Comment, 83 Fed. Reg 61,571 (Nov. 30, 2018) (Mar. 15, 2019), available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62050&SearchText=; See also Letter from HIS Markit, Post-Trade Name Give-Up on Swap Execution Facilities, Request for Comment, 83 Fed. Reg. 61,571 (Nov. 30, 2018), available at https://comments.cftc.gov/PublicComments/ViewComment.aspx?id=62050&SearchText=. See also P. Madigan, CFTC to Test Role of Anonymity in SEF Order Book Flop, Risk Magazine (Nov. 21, 2014) (quoting a SEF execution as follows: "The revealing of the name is a legacy behaviour and it's not necessary that we reveal it. Should we be told not to by the regulators, we will flick a switch and the world will go on. It will not be a profound change and it's not going to require re-engineering the system."), available at https://www.risk.net/derivatives/2382497/cftc-test-role-anonymity-sef-order-book-flop.

51 See Letter from the Securities Industry and Financial Markets Association to the CFTC, Post-Trade Name Give-Up on Swap Execution Facilities; Request for Comment—RIN 3038-AE79, 83 Fed. Reg. 61751, pg. 2 (Nov. 30, 2018). The hyperlink can be found in fn. 16 supra.

52 Letter from SIFMA and ISDA to the CFTC, RIN 3038-AD18 – Core Principles and Other Requirements for Swap Execution Facilities (Mar. 8, 2011) (stating that the CFTC "should not limit the permissible execution methods to Order Book or RFQ for Required Transactions" and answering "a strong no" to the question of whether the CFTC should require "swaps that meet a certain level of activity should be limited to trading through Order Books"), available at https://www.isda.org/a/ASiDE/cftc-sef-letter.pdf.

53 See, e.g., Letter from the SIFMA to the CFTC, Post-Trade Name Give-Up on Swap Execution Facilities; Request for Comment—RIN 3038-AE79, 83 Fed. Reg. 61751 (Nov. 30, 2018), at 2-3 (Mar. 25, 2019) ("The Commission should aim to preserve the diversity of trading models, which supports the Commission's goal of promoting SEF trading across a diverse range of products.").

54 Id at 3.

55 For relatively liquid swaps (i.e., Required Transactions, 17 C.F.R. § 37.9(a)(1)), existing SEF regulations require use only of a limited RFQ mode of execution (17 C.F.R. § 37.9(a)(3)) and do not impose a best execution requirement across markets or modes of execution. See 17 C.F.R. § 37.9(a)(2)(i)(A)-(B) (stating that "[e]ach Required Transaction that is not a block trade . . . shall be executed on a [SEF] in accordance with one of the following methods of execution: (A) An Order Book as defined in § 37.3(a)(3); or (B) A Request for Quote System, as defined in paragraph (a)(3) of this section, that operates in conjunction with an Order Book as defined in § 37.3(a)(3)"). Thus, even for the standardized swaps markets, SEF participants can trade with a single, disclosed dealer after seeking—and not necessarily receiving—competitive quotes from no fewer than two other disclosed dealers.

56 Under existing SEF regulations**,** the CFTC has not adopted required modes of execution for illiquid or uncleared swaps (i.e., Permitted Transactions, 17 C.F.R. § 37.9(a)(1)), meaning it remains permissible within the existing SEF regulatory framework to execute such swaps with a single dealer of choice. 17 C.F.R. § 37.9(c)(2) (providing that a SEF "may offer any method of execution for each Permitted Transaction"). This can occur, moreover, without disclosure of trading interest to others in the market and through the most common OTC method of execution—the telephone. Id.

57 There is definite merit in reconsidering the permitted modes of the execution for Required Transactions and exploring additional minimum trading functionalities, like required request-for-market, anonymous RFQ, and average pricing protocols. These issues are beyond the scope of the current proposal, but we encourage the CFTC to review our comment letter on a number of related issues in the recent SEF proposal. See Letter from Better Markets to the CFTC, Public Comment on Swap Execution Facilities and Trade Execution Requirement (RIN 3038-AE25); Public Comment on Request for Comment on Post-Trade Name Give-Up on Swap Execution Facilities (RIN 3038-AE79), at 2 (Mar. 15, 2019). The hyperlink can be found in fn. 13 supra.

58 CFTC Market Risk Advisory Committee Meeting (Apr. 2, 2015), at 148 (contending that "there's substantial risk on those package trades with whom to execute the Treasury like [sic]" and stating that "[s]o long we're in that world, particularly for package trades, [Goldman] get[s] very nervous about name give-up").

59 That is especially true where, as here, solutions for simultaneous or nearly simultaneous execution of a CFTC-jurisdictional contingent leg permit anonymous execution (and if necessary, trading in a disclosed RFQ).

60 See, e.g., Letter from the Managed Funds Association to CFTC, Post-Trade Name Give-Up on Swap Execution Facilities (RIN Number 3038-AE79) at 6 (Mar. 15, 2019) (concluding that "[p]ackage transactions containing both a cleared swap and an uncleared instrument would still be permitted to use name give-up for the uncleared leg, given the need to know counterparty identities to manage the ongoing credit, operational, and legal exposures" but explaining that "name give-up should not be required for packages containing a cleared swap and another cleared instrument, such as a U.S. Treasury security cleared at the Fixed Income Clearing Corporation"). The hyperlink can be found in fn. 33 supra.

61 CEA section 5h(e); 7 U.S.C. 7b–3(e) (stating that "[t]he goal of this [SEF] section is to promote the trading of swaps on swap execution facilities and to promote pre-trade transparency in the swaps market").

62 See CFTC, Post-Trade Name Give-Up on Swap Execution Facilities, 83 Fed. Reg. 61571 (Nov. 30, 2018). Note the Federal Register citation.

63 See CFTC, Ex Parte Meeting for Proposed Rule 83 FR 61571, No. 1432, Citigroup (Dec. 9, 2019), available at https://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=1310&SearchText=.

64 See CFTC, Ex Parte Meeting for Proposed Rule 83 FR 61571, No. 1354, Bank of America Merrill Lynch (Mar. 8, 2019), available at https://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=1354&SearchText=. See CFTC, Ex Parte Meeting for Proposed Rule 83 FR 61571, No. 1433, Bank of America Merrill Lynch (Dec. 10, 2019), available at https://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=1433&SearchText=.

65 See CFTC, Ex Parte Meeting for Proposed Rule 83 FR 61571, No. 1310, Barclays (Jan. 7, 2019), available at https://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=1310&SearchText=. See also CFTC, Ex Parte Meeting for Proposed Rule 83 FR 61571, No. 1350, Barclays (Mar. 7, 2019), available at https://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=1350&SearchText=.

66 See CFTC, Ex Parte Meeting for Proposed Rule 83 FR 61571, No. 1313, Goldman Sachs (Jan. 8, 2019), available at https://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=1313&SearchText=.

67 See CFTC, Ex Parte Meeting for Proposed Rule 83 FR 61571, No. 1316, J.P. Morgan (Jan. 9, 2019), available at https://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=1316&SearchText=. See also CFTC, Ex Parte Meeting for Proposed Rule 83 FR 61571, No. 1333, J.P. Morgan (Mar. 1, 2019), available at https://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=1333&SearchText=.

68 See CFTC, Ex Parte Meeting for Proposed Rule 83 FR 61571, No. 1306, Morgan Stanley (Jan. 11, 2019), available at https://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=1306&SearchText=.

69 See CFTC, Ex Parte Meeting for Proposed Rule 83 FR 61571, No. 1317, HSBC (Jan. 7, 2019), available at https://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=1307&SearchText=.

70 See, e.g., CFTC, Ex Parte Meeting for Proposed Rule 83 FR 61571, No. 1309, TP/ICAP (Jan. 10, 2019), available at https://comments.cftc.gov/PublicComments/ViewExParte.aspx?id=1309&SearchText=.

71 See 7 U.S.C. § 1a(15)(A)(i) (defining a DCO as "a clearinghouse, clearing association, clearing corporation, or similar entity, facility, system, or organization that, with respect to an agreement, contract, or transaction . . . enables each party to the agreement, contract, or transaction to substitute, through novation or otherwise, the credit of the derivatives clearing organization for the credit of the parties").

72 See 7 U.S.C. § 7a–1(c)(2)(D)(iii) (requiring DCOs to "limit the exposure of the [DCO] to potential losses from defaults by members and participants" through "margin requirements and other risk control mechanisms"). See also 7 U.S.C. § 7a–1(c)(2)(D)(iv) (requiring DCOs to collect "sufficient" margin to "cover potential exposures in normal conditions"); 7 U.S.C. § 7a–1(c)(2)(D)(v) (requiring DCOs to establish risk-based and regularly reviewed models and parameters used in setting margin requirements).

73 See 7 U.S.C. § 7a–1(c)(2)(F)(i) (requiring DCOs to establish standards and procedures that are designed to protect and ensure the safety of member and participant funds and assets). See also 7 U.S.C. § 7a–1(c)(2)(F)(ii) (requiring DCOs to "hold member and participant funds and assets in a manner by which to minimize the risk of loss or of delay in the access by the DCO to the assets and funds").

[74] See, e.g., 7 U.S.C. § 7a–1(C)(2)(G) (requiring DCOs to "have rules and procedures designed to allow for the efficient, fair, and safe management of events during which members or participants . . . become insolvent . . . or . . . otherwise default on the obligations of the members or participants to the [DCO]").

[75] See 7 U.S.C. § 7a–1(c)(2)(A)-(R).

[76] CFTC Regulation § 37.702(b)(2) requires a SEF to coordinate with each registered DCO to which it submits transactions for clearing to develop rules and procedures to facilitate ''prompt and efficient'' transaction processing in accordance with the requirements of § 39.12(b)(7). 17 C.F.R. § 37.702(b)(2).

[77] CFTC Regulation § 37.702(b)(1) requires a SEF to ensure that it has the capacity to route transactions to the DCO in a manner acceptable to the registered DCO for purposes of clearing. 17 C.F.R. § 37.702(b)(1).

[78] CFTC Regulation § 39.12(b)(7)(i)(A) requires each registered DCO to coordinate with a relevant SEF or DCM to develop rules and procedures to facilitate "prompt, efficient, and accurate" processing of all transactions, including swaps submitted to the registered DCO for clearing by the SEF or DCM. 17 C.F.R. § 39.12(b)(7)(i)(A).

[79] CFTC Regulation § 39.12(b)(7)(ii)–(iii) each further require a registered DCO to establish standards to accept or reject transactions for clearing as quickly as would be technologically practicable as if fully automated systems were used. 17 C.F.R. § 39.12(b)(7).

[80] CFTC Regulation § 1.74 requires clearing FCMs to coordinate with DCOs to establish systems that enable the FCM, or the DCO acting on its behalf, to accept or reject each trade "as quickly as would be technologically practicable if fully automated systems were used." 17 C.F.R. § 1.74. Related CFTC division guidance has provided that SEFs must (1) ensure clearing FCMs are identified in advance on an order-by-order basis; and (2) facilitate pre-execution credit screening of orders for compliance with risk- based limits in accordance with CFTC Regulation § 1.73. See CFTC Joint Staff Guidance, Divisions of Market Oversight and Clearing and Risk, Staff Guidance on Swaps Straight-Through Processing (September 26, 2013) ("2013 STP Guidance"), available at: http://www.cftc.gov/idc/groups/public/@newsroom/documents/file/stpguidance.pdf.

[81] SEFs must coordinate with DCOs in processing transactions for clearing under CFTC Regulation § 37.702(b)(2). 17 C.F.R. § 37.702(b)(2). The 2013 STP Guidance accordingly expressed the view that a SEF must route swaps to a DCO in compliance with the "as quickly a technologically practicable" standard applicable to DCOs. 2013 STP Guidance at 4.

[82] The 2013 STP Guidance requires swaps that are routed to a DCO through a SEF's use of a post-execution affirmation hub (e.g., Markitwire) to meet the CFTC Regulation § 37.702(b) STP standard. 2013 STP Guidance at 4. See 17 C.F.R. § 37.702(b). The Divisions later permitted SEFs to send trades to be manually affirmed prior to routing the trade to the DCO, provided they are routed to the DCO within 10 minutes. See CFTC Letter No. 15–67, Divisions of Market Oversight and Clearing and Risk, Straight Through Processing and Affirmation of SEF Cleared Swaps (Dec. 21, 2015) ("2015 STP Guidance"), available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrlettergeneral/documents/letter/15-67.pdf.

[83] Breakage agreements, in essence, are contracts that allocate financial responsibilities and exposures should a swap between counterparties be nullified on account of some action subsequent to execution. The 2013 STP Guidance prohibits breakage agreements within the SEF E2C workflow.

[84] These are not necessarily limited to technology investments. For example, with respect to the use of affirmation hubs, such investments might include hiring sufficient staff to prioritize affirming trades so that they can be timely released to the DCO.

[85] CFTC Regulation § 1.73(a)(1) requires each clearing FCM to establish risk-based limits for each proprietary account and each customer account that are based on position size, order size, margin requirements, or similar factors. 17 C.F.R. § 1.73(a)(1). Similarly, CFTC Regulation § 1.73(a)(2)(i) states that when a clearing FCM provides electronic market access or accepts orders for automated execution, the FCM must use automated means to screen orders for compliance with such risk-based limits. 17 C.F.R. § 1.73(a)(2)(i). CFTC Regulation 1.73(a)(2)(ii) states that when a clearing FCM accepts orders for non-automated execution, the FCM must establish and maintain systems of risk controls reasonably designed to ensure compliance with the limits. 17 C.F.R. § 1.73(a)(2)(ii). CFTC Regulation § 1.73(a)(2)(iii) states that when a clearing FCM accepts transactions that were executed bilaterally and then submitted for clearing, the FCM must establish and maintain systems of risk controls reasonably designed to ensure compliance with the limits. 17 C.F.R. § 1.73(a)(2)(iii).

[86] The 2013 Staff STP Guidance provided that (1) a clearing FCM must be identified in advance for each counterparty on an order-by-order basis, if the transaction is intended to be cleared; and (2) a SEF must facilitate pre-execution screening in

accordance with CFTC Regulation § 1.73 on an order-by- order basis However, as we have said before, the CFTC must thread the needle carefully on pre-execution credit checks and other matters, because SEF participation requirements (e.g., required representations concerning FCM trading guarantees) may seek types of assurances or financial arrangements that simply are not feasible (or that are feasible only at great expense) for non-dealer participants in the markets. Such requirements can have legitimate risk management purposes but also can be used to illegitimately limit SEF participation and therefore competition with the dealers.

87 See 2013 STP Guidance, at 3 (providing that "orders which have satisfied the Clearing FCMs' pre-execution limits are deemed accepted for clearing and thereby subject to a guarantee by the Clearing FCM upon execution" and clarifying that "Clearing FCMs may not reject a trade that has passed its pre-execution filter because this would violate the requirement that trades should be accepted or rejected for clearing as soon as technologically practicable").

88 CFTC Regulation § 37.702(b) and § 39.12(b)(7) require SEFs and registered DCOs, respectively, to coordinate with one another to facilitate the clearing of swap transactions executed on or through SEFs. CFTC, Customer Clearing Documentation, Timing of Acceptance for Clearing, and Clearing Member Risk Management, 77 Fed. Reg. 21278, 21283 (Apr. 9, 2012).

89 CFTC Regulation § 39.12(b)(7)(ii)–(iii) each require a registered DCO to establish standards to accept or reject transactions for clearing as quickly as would be technologically practicable as if fully automated systems were used. 17 C.F.R. § 39.12(b)(7). CFTC Regulation § 37.702(b)(2) requires a SEF to coordinate with each registered DCO to which it submits transactions for clearing to develop rules and procedures to facilitate "prompt and efficient" transaction processing in accordance with the requirements of § 39.12(b)(7). 17 C.F.R. § 37.702(b)(2).

90 See 2015 STP Guidance, at 3 (noting that "the AQATP standard may be met if trades are routed to and received by the relevant DCO no more than 10 minutes after the execution of the trade"). CFTC Regulations § 37.702(b) and § 39.12(b)(7) require SEFs and DCOs, respectively, to coordinate to facilitate the clearing of swaps executed on or through the SEF in accordance with the AQATP Standard. 17 C.F.R. §§ 37.702(b) and 39.12(b)(7). The 10-minute standard is hardly tied to technologically limitations as the AQATP Standard might intuitively suggest. It arose from a CFTC agreement with ISDA to preserve manual affirmation to reduce DCO submission errors subsequent to execution on voice-trading platforms.

91 2013 STP Guidance, at 5.

92 Indeed, the CFTC and the CFTC's divisions issued most of the relevant regulations and guidance setting forth STP standards for FCMs, DCOs, and others in 2012 and 2013. See generally CFTC, Customer Clearing Documentation, Timing of Acceptance for Clearing, and Clearing Member Risk Management, 77 Fed. Reg. 21307 (Apr. 9, 2012).

93 Thomas Jaffe, Getting between the wall and the wallpaper (Oct. 20, 1997), available at https://www.forbes.com/forbes/1997/1020/6009066a.html#7d354a61363d.

94 7 U.S.C. § 7b–3(f)(2)(B) (emphasis added).

95 7 U.S.C. § 7b–3(f)(2)(B).

96 7 U.S.C. § 7b–3(f)(2)(A)(ii).

97 CFTC, Core Principles and Other Requirements for Swap Execution Facilities; Final Rule, 78 Fed. Reg. 33476, 33508 (Jun. 4, 2013) (emphasis added), available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2013-12242a.pdf.

98 Id (emphasis added).

99 Id.

100 Id.

101 Id.

102 See Commission regulation 37.702(a); 17 C.F.R. 37.702(a).

103 17 C.F.R. § 37.202(a).

104 See CFTC, Post-Trade Name Give-Up on Swap Execution Facilities, 84 Fed. Reg. 72262, 72267 (Dec. 31, 2019).

[105] 7 U.S.C. § 5(a).

[106] 7 U.S.C. § 5(b).

[107] CEA section 5h(e); 7 U.S.C. 7b–3(e) (stating that "[t]he goal of this [SEF] section is to promote the trading of swaps on swap execution facilities and to promote pre-trade transparency in the swaps market").

[108] See CFTC, Core Principles and Other Requirements for Swap Execution Facilities; Final Rule, 78 Fed. Reg. 33476, 33508 (Jun. 4, 2013).

[109] See fn. 8 supra.

[110] See fn. 9 supra.

[111] Merriam-Webster. (n.d.). Impartial. In Merriam-Webster.com dictionary, available at https://www.merriam-webster.com/dictionary/impartial.

[112] Merriam-Webster. (n.d.). Access. In Merriam-Webster.com dictionary, available at https://www.merriam-webster.com/dictionary/access.

[113] CFTC, Post-Trade Name Give-Up on Swap Execution Facilities, 84 Fed. Reg. 72262, 72267 (Dec. 31, 2019) (emphasis added).

[114] CFTC Division of Clearing and Risk, Division of Market Oversight, and Division of Swap Dealer and Intermediary Oversight, Memorandum To CFTC Registered Swap Execution Facilities and Applicants for Registration as a Swap Execution Facility (Nov. 14, 2013) ("[S]ome SEFs establish that any two market participants may only execute an [intended to be cleared] Swap on a SEF's trading systems or platforms if the market participants have a pre-execution agreement, such as a breakage agreement. Some SEFs limit the ability to stream indicative bids and offers to a subset of market participants, while other SEFs require that a market participant be a swap dealer or a clearing member in order to respond to a RFQ for an ITBC Swap, thus disallowing non-dealers from participating in the RFQ process as liquidity providers. Such restrictions are inconsistent with the impartial access requirement set forth in the Commodity Exchange Act ('CEA') and [CFTC] regulation 37.202."), available at https://www.cftc.gov/sites/default/files/idc/groups/public/@newsroom/documents/file/dmostaffguidance111413.pdf.

[115] Id.

[116] 7 U.S.C. § 24a(c)(6); 17 C.F.R. § 49.17(f)(2). CEA section 21(c)(6) requires SDRs to "maintain the privacy of any and all swap transaction data" that they receive from a swap dealer, counterparty, or other registered entity, including a SEF. 7 U.S.C. § 24a(c)(6).

[117] 17 C.F.R. § 49.17(f)(2) (providing "the data and information maintained by the registered [SDR] that may be accessed by either counterparty to a particular swap shall not include the identity or the [LEI] . . . of the other counterparty to the swap, or the other counterparty's clearing member for the swap, if the swap is executed anonymously on a [SEF] or [DCM], and cleared in accordance with [CFTC] regulations in §§ 1.74, 23.610, and 37.12(b)(7)").

[118] CFTC, Swap Data Repositories—Access to SDR Data by Market Participants, 79 Fed. Reg. 16672, 16673-16674 (Mar. 26, 2014), available at https://www.cftc.gov/sites/default/files/idc/groups/public/@lrfederalregister/documents/file/2014-06574a.pdf.

[119] 17 C.F.R. § 49.17(f)(2).

[120] CFTC, Post-Trade Name Give-Up on Swap Execution Facilities, 84 Fed. Reg. 72262, 72266 (Dec. 31, 2019).

[121] Id.

[122] CEA section 5h(e); 7 U.S.C. 7b–3(e) (stating that "[t]he goal of this [SEF] section is to promote the trading of swaps on swap execution facilities and to promote pre-trade transparency in the swaps market").

[123] 7 U.S.C. § 5(b).

[124] 7 U.S.C. § 5(a).

[125] 7 U.S.C. § 7b-3(f)(11).

[126] See fn. 3 supra.

[127] Letter from the Securities Industry and Financial Markets Association to the CFTC, Post-Trade Name Give-Up on Swap Execution Facilities; Request for Comment—RIN 3038-AE79, 83 Fed. Reg. 61751, at 5 (Nov. 30, 2018). The hyperlink can be found in fn. 16 supra.

[128] Id (emphasis added).

[129] CFTC, Post-Trade Name Give-Up on Swap Execution Facilities, 84 Fed. Reg. 72262, 72269 (Dec. 31, 2019).

[130] Section 726 of the Dodd-Frank Act instructed that the CFTC "shall adopt rules which may include numerical limits on the control of, or the voting rights with respect to, any . . . [SEF] . . . that posts swaps or makes swaps available for trading, by a [BHC] . . . with total consolidated assets of $50 billion or more, a nonbank financial company supervised by the Board [of Governors of the Federal Reserve System], an affiliate of such a [BHC] or nonbank financial company, a swap dealer, major swap participant, or associated person of a swap dealer or major swap participant." Section 726, Public Law 111-203, 124 Stat. 1376 (2010).

[131] Under section 726(a) of the Dodd-Frank Act, the CFTC was required to implement regulations to "mitigate conflicts of interest" within 180 days of the enactment of Title VII. Id.

[132] The ownership and control of derivatives market infrastructure is an often overlooked issue that extends beyond just clearinghouses, exchanges, and SEFs. See fns. 8 and 9 supra, In Re Credit Default Swaps Antitrust Litigation, U.S. District Court SDNY, 13 MD 2476 (Jan. 31, 2014) (alleging that credit derivatives dealers "collectively owned over 70% of Markit's voting shares" and used their market power and control of Markit to prevent licensing that would promote pre and post-trade transparency on new credit derivatives exchanges and further alleging that dealers "used their role on the DTCC board of directors to promulgate rules to prevent the [public] release of [pricing] information"). The dealers have extracted equity and governance controls in exchange for their participation in new market structure entities, which accommodate and even incentivize such demands to make more probable their commercial viability. In addition to finalizing the Post-Trade Name Give-Up proposal, the CFTC should publish a report on BHC ownership of derivatives market infrastructure.

[133] ISDA, General Disclosure Statement for Transactions (Mar. 2018), available at https://cdn.marquee.gs.com/documents/disclosures/b1b9a982-0bc2-42a0-a11b-cc1d657605ae.pdf.

[134] For one example of a specific conflict-of-interest disclosure, see Dodd-Frank Swap Dealer Disclosures and Notifications (Dec. 11, 2019), available at https://www.goldmansachs.com/disclosures/swaps-related-disclosures/df-swap-dealer-disclosures-and-notifications.pdf.

[135] Letter from the U.S. Department of Justice to the CFTC, In the Matter of RIN 3038-AD01: Comments on Proposed Rules Limiting Ownership and Regulating Governance for Derivatives Clearing Organizations, Designated Contract Markets, and Swap Execution Facilities (Dec. 28, 2010), available at https://www.justice.gov/atr/comments-proposed-rules-limiting-ownership-and-regulating-governance-derivatives-clearing.